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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1009

WESTERN NATURAL GAS COMPANY,
Petitioner,

VERSUS

CITIES SERVICE GAS COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

BRIEF FOR RESPONDENT CITIES SERVICE GAS COMPANY IN OPPOSITION

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February 27, 1967

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BRIEF FOR RESPONDENT CITIES SERVICE GAS COMPANY IN OPPOSITION

OPINIONS BELOW

The original opinion of the Superior Court of the State of Delaware in and for New Castle County (Pet. App. B, pp. 5a-12a) is unreported. The first opinion of the Supreme Court of Delaware (Pet. App. C, pp. 14a-25a) is reported at 201 A.2d 164. The opinion, on remand, of the Delaware Superior Court (Pet., App. D, pp. 28a-35a) is unreported. The second opinion of the Supreme Court of Delaware (Pet. App. E, pp. 36a-44a) is reported at 223 A.2d 379.

JURISDICTION

The opinion of the Supreme Court of Delaware was entered on October 12, 1966. A petition for rehearing was denied and mandate issued on November 1, 1966. The petition for certiorari was filed on January 27, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act are set forth in Appendix A to the Petition, pp. 1a-4a.

QUESTION PRESENTED

Whether in the circumstance of this case the primary jurisdiction, exhaustion of administrative remedy and filed rate doctrines operate to oust the Delaware courts of jurisdiction to pass upon the claims of Cities Service Gas Company for refunds of the excess over the contract price paid to Western Natural Gas Company because of a void Kansas Minimum Price Order.

STATEMENT OF THE CASE

This suit is the last of four identical actions brought by Cities Service Gas Company (Cities) in the Superior Court of New Castle County, Delaware, to recover overpayments made to four producers of natural gas in the Kansas-Hugoton Field under the mandate of the Kansas Minimum Price Order which was held invalid by this Court in *Cities Service Gas Co.* v. *State Corporation Commission*, 355 U.S. 391 (1958).

Three of the four producers sought and obtained a writ of certiorari to review the jurisdiction of the Delaware

courts (363 U.S. 818). This Court affirmed the Delware Court's jurisdiction. *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656 (1961). The facts in this case are substantially identical with the facts stated in that opinion.[1]

Cities is a natural gas pipeline company. Petitioner, Western Natural Gas Company (Western), is a producer of natural gas. In 1949 Cities contracted with Western to purchase natural gas produced in the Hugoton Field in Kansas at a contract price of 8 cents per Mcf (A4, A10).[2] On December 2, 1953, the Kansas Corporation Commission issued an order fixing a minimum price of 11 cents per Mcf to be paid for all gas taken from the Kansas-Hugoton Field. The effect of this Order was to require Cities to pay Western 11 cents rather than the lower price fixed in the contract (A4-5, A10).

Prior to making its first payment at the higher rate, Cities advised Western by letter dated January 21, 1954, that it was prosecuting a suit for judicial review of the Order but it would comply with the Order's provisions while the suit was pending. The letter further advised that the payments to be tendered under the Order were to be made and accepted as involuntary payments, and concluded by stating that if the Order was determined to be invalid, Cities would expect Western to refund the over-

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[1] The litigation with producers other than Western has now been terminated, and the monies received by Cities have been passed on to Cities' customers who paid an increased price on account of the void Kansas Order.

[2] Citations to the record will follow the pattern adopted by Western. See Pet., p. 2, fn. 1.

payments (A5-6, A11). Thereafter, until January 20, 1958, each monthly payment by Cities to Western was made by a voucher check which bore a caveat that the payments were tendered "subject to provisions" of the January 21, 1954, letter. Western received, cashed and retained the proceeds of each voucher check without objection (A6-7, A11).

Following this Court's holding, on January 20, 1958, that the Kansas Minimum Price Order was invalid *(Cities Service Gas Co.* v. *State Corporation Commission, supra),* Cities commenced this action in the Superior Court of Delaware to recover the overpayments made to Western. As in the complaints described in this Court's opinion in *Pan American, supra,* Cities, in its complaint here, alleged the gas purchase contract specifying the 8-cent price; the entry of the Kansas Minimum Price Order; Cities' letter of January 21, 1954; Cities' monthly voucher checks with the "subject to provisions" noted thereon; and this Court's determination that the Kansas Order was invalid (A4-7). Based upon these allegations, Cities sued for the overcharges paid to Western on alternative theories that there was a contract to refund the overpayments and that Cities was entitled to restitution of the overpayments by which Western had been unjustly enriched under the compulsion of the invalid Kansas Order (A7-9).

Western denied that there was a contract to refund, invoked equitable defenses to the restitution theory, and defended upon its status as an independent producer of natural gas under the Natural Gas Act and upon the regulation of its rates by the Federal Power Commission (A10-15). Western contended that the trial court was without jurisdiction over the suit because the determination as to

what constituted its filed rate and whether or not it had been overpaid for gas delivered to Cities were matters within the exclusive jurisdiction of the Federal Power Commission under the Natural Gas Act (A12).[3] Western also defended on the ground that since it had filed the void Order along with the sale contract as its rate schedule, its rate was 11 cents and the Natural Gas Act prohibited deviation from that rate (A10-14).

The Superior Court of Delaware overruled Western's Motion for Summary Judgment based on its defenses grounded on the Natural Gas Act, granted Cities' Motion for Summary Judgment on the theory of restitution and entered judgment for Cities in the amount sued for with interest thereon at 6 per cent per annum (Pet., App. B). Upon Western's appeal, the Delaware Supreme Court similarly rejected Western's Natural Gas Act defenses and affirmed the trial court's jurisdiction over the issues in this suit (Pet., App. C).[4] The Delaware Supreme Court held that the uniform decisions of the United States Courts of Appeals[5] supported and required the determination that

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[3] This question was presented to this Court in *Pan American Petroleum Corp.* v. *Superior Court, supra,* in which it was held that State Courts have jurisdiction over suits such as this based on common law rights even though the defense is based upon the Natural Gas Act.

[4] Citing *Pan American, supra.*

[5] *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co., Inc.,* 297 F.2d 561 (8th Cir. 1962), *cert. denied,* 370 U.S. 937 (1962); *Natural Gas Pipeline Co. of America* v. *Federal Power Commission,* 253 F.2d 3 (3d Cir. 1958), *cert. denied sub nom, Dorchester Corp.* v. *Natural Gas Pipeline Co. of America,* 357 U.S. 927 (1958); *Cities Service Gas Co.* v. *Federal Power Commission,* 255 F.2d 860 (10th Cir. 1958), *cert. denied sub nom, Magnolia Petroleum Co.* v. *Cities Service Gas Co.,* 358 U.S. 837 (1958).

Western's filed rate under the Natural Gas Act was the 8-cent contract rate, unaffected by the void Kansas Minimum Price Order (Pet., App. C, p. 17a).

Although the court went on to recognize that Western had received payments in excess of its filed rate, it held that the showing of duress was insufficient to justify recovery on the theory of unjust enrichment. The Delaware Supreme Court therefore ordered the case remanded for further proceedings (Pet., App. C).

Following this Court's denial of Western's petition for certiorari (No. 408, Oct. T. 1964, 379 U.S. 905 (1964)) the Superior Court, on remand, again granted Cities' Motion for Summary Judgment. Limiting its consideration to Cities' substantive right to recover, the Court this time found a contract to refund based on the January 21, 1954, letter and the receipt, cashing and retention by Western of the proceeds of the checks (Pet., App. D). On appeal, the Delaware Supreme Court reviewed the substantive issues in this case and affirmed the Superior Court's judgment (Pet., App. E).

ARGUMENT

Western does not question the substantive conclusion of the Delaware Supreme Court that Cities had a contractual right to recover the payments made above its contract price. It seeks instead to reach back to the earlier decision of that court and to question the jurisdiction of the Delaware courts to pass on these matters. The questions which Western seeks to raise are virtually identical to those raised in Western's earlier petition for certiorari (See Pe-

tition in No. 408, Oct. T. 1964), which this Court denied, 379 U.S. 905 (1964).[6] As shown below, the decision of the Delaware court is in accord with established precedents and there is no conflict of decisions. Accordingly, there is no warrant for review by this Court.

I

The Decision of the Delaware Court Does Not Infringe Upon the Primary Jurisdiction of the Federal Power Commission

Western seeks to invoke the primary jurisdiction and exhaustion of administrative remedy doctrines because it asserts, "[r]egulated companies cannot follow the dictates of two authorities as to past, present or future rates. * * *" (Pet., p. 10). Further, according to Western, those doctrines are "peculiarly applicable where, as here, a court and an administrative body may otherwise render conflicting decisions within the administrative body's jurisdiction * * *." (Pet., p. 4, fn. 9.) However, a virtually identical argument was made by the petitioners and rejected by this Court in *Pan American Petroleum Corp.* v. *Superior Court, supra.*

As this Court noted in *Pan American,* the petitioners were contending "that to permit the state courts to entertain the suits brought by Cities Service will jeopardize the uniform system of regulation that Congress established

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[6] While Western points out (Pet., p. 2), Cities had urged that the earlier decision of the Delaware Supreme Court was not final, Western had strenuously argued that that decision of the Delaware Court was final (see Pet. in No. 408, Oct. T. 1964 at pp. 10-11).

through the Natural Gas Act" (See 366 U.S. at 665).[7] In rejecting that argument, this Court ruled (*Id.*, at 665-66):

> "* * * Apart from other considerations that dispel such fears, it should be remembered that the route to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions. In *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, the question before the Court was whether not merely the state courts but any court had jurisdiction to construe a tariff prior to consideration of the disputed question of construction by the Interstate Commerce Commission. It was argued in that case, as it is argued here, that to permit entry into the courts, without initial resort to the Commission, would destroy essential uniformity. The answer there given by Mr. Justice Brandeis, speaking for the Court, applies here:
>
> 'This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this Court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission.' 259 U.S., at 290-291."

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[7] See, also, Brief for Petitioner in No. 80, Oct. T. 1960, at pp. 51, *et seq.*

See, also, *e.g.*, *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co., Inc.*, 297 F.2d 561 (8th Cir. 1962), *cert. denied*, 370 U.S. 937 (1962); *Landon* v. *Northern Natural Gas Co.*, 338 F.2d 17 (10th Cir. 1964), *cert. denied*, 381 U.S. 914 (1965)[8] which also involved the recovery of overpayments made pursuant to the void Kansas Minimum Price Order. The primary jurisdiction doctrine is equally inapplicable in this case and does not invalidate the judgment of the Delaware court.

Also, contrary to Western's argument, the decision of the Delaware court is neither in conflict with this Court's decision in *Carnation Company* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966), nor is it in conflict with the decisions of the Fifth Circuit in *J. M. Huber Corp.* v. *Denman*, 367 F.2d 104 (1966), and *Weymouth* v. *Colorado Interstate Gas Co.*, 367 F.2d 84 (1966).

Carnation's holding that in light of the Shipping Act's provision exempting activities lawful under Section 15 thereof from the antitrust laws, court proceedings founded upon an alleged violation of the antitrust laws should be stayed until the Maritime Commission had determined the applicability of the exemption is not violated by the facts in this case.

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[8] Western's attempted distinction of these cases (Pet., p. 12, fn. 10) is irrelevant since, whatever questions were raised in the petitions in these cases, the opinions of the Courts of Appeals clearly dealt with the issue of jurisdiction. In all probability, no primary jurisdiction questions were raised in the Petitions for Certiorari in these cases because of the petitioners' recognition that the issue had already been resolved in this Court's *Pan American* decision.

In *Huber* and *Weymouth*, the Fifth Circuit not only acknowledged that its action involved a "new application of the doctrine of primary jurisdiction" (367 F.2d at 111), but its ruling, that action should be postponed to give the Federal Power Commission an opportunity to determine initially whether it had jurisdiction in the premises, adopted the suggestion of the Commission itself *(Ibid.)*.

The situation here is entirely different. The Federal Power Commission, on at least two separate occasions, had expressly undertaken to leave the resolution of this controversy to the courts as a more appropriate forum. The first of these occasions was in connection with the Commission's denial of Western's motion to consolidate its complaint that Cities had failed to pay at the rate alleged by Western to be the lawful filed rate with another proceeding involving Cities' rates (See Pet., pp. 7-8).[9] The Commission there expressly noted the pendency of the instant litigation and held:

> "Since litigation is now pending between the parties concerning the lawful rate for the sale and purchase of gas, it is neither necessary, appropriate, nor in the public interest for the Commission, at this time, to undertake to determine the rates for these sales * * *." (*Id.* at mimeo, p. 2).

In view of this determination, the reasons why the Commission has taken no further action in this proceeding are

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[9] Order Denying Petition for Leave to Intervene and Denying Motion to Consolidate Proceedings, Docket Nos. G-18799, G-14958, issued February 9, 1961, quoted and relied upon by the Delaware Supreme Court (Pet., App. C, p. 18a).

obvious even though, as Western points out (Pet., p. 8), the docket has not been technically closed.

The second occasion was in connection with the termination of a rulemaking proceeding instituted for the purpose of dealing with the effects of the void Kansas Minimum Price Order upon filed rates and upon future rate filings. Referring to this Court's decision in the *Pan American* case, *supra*, the Commission originally stated:[10]

> "We recognize, moreover, that a buyer of natural gas who has paid seller on the basis of a state minimum price law had an adequate remedy in an appropriate court in the event that his contract entitles him to a refund as a result of the invalidity of the state minimum price laws."[11]

Still adverting to this Court's *Pan American* decision, the Commission subsequently revised the statement above to read (27 F.P.C. at 528 (1962)):

> "We recognize, moreover, that a buyer of natural gas who has paid seller on the basis of a state minimum price law can invoke the jurisdiction of an appropriate court in the event that his contract provides for a refund if the state minimum price laws are held invalid."

And, by way of explanation, the Commission commented *(Ibid.)*:

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[10] *Nonacceptability of Rate Filings Based on State-Prescribed Minimum Prices*, Docket No. R-168, 27 F.P.C. 326, 327 (1962).

[11] The statement quoted in the text appears in the Commission order immediately following the statement reproduced by Western (Pet., p. 14). Obviously, when the two statements are read together, they do not have the thrust urged by Western.

"* * * [t]hat sentence was not intended to express or imply any view as to whether contract actions in appropriate state or federal courts might be subject to defenses other than defenses based on the Kansas minimum-rate order itself. To avoid doubt on that score, we hereby amend the above-quoted sentence * * *."

Because of these prior Commission actions, there is plainly no conflict between the Delaware court's decision and the decisions of the Fifth Circuit. There is no confusion as to whether this case and the merits of its controversy are subject to the jurisdiction of the Commission or of the courts. The Commission has deferred to the courts.

II

The Delaware Court's Decision Does Not Conflict With the Filed Rate Doctrine

Western's further argument that the Delaware court's decision violates the so-called "filed rate" doctrine erroneously assumes that the 11-cent price fixed in the void Kansas Minimum Price Order has become Western's legal rate on file with the Commission. The fact is that there has been no Commission action which had any such effect.[12]

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[12] When Western filed its initial rate schedule for the sale of gas to Cities (A100) and its application for a certificate of public convenience and necessity authorizing the continuation of the sale at a rate which was in part determined by the Kansas Minimum Price Order, the Commission's acknowledgment expressly advised that the:

"* * * acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as *constituting approval of any rate, charge, classification,* * * *." (Emphasis supplied.) (Letter from Federal Power Commission to Western Natural Gas Co., dated March 8, 1955.) (A. 90.)

Moreover, the Kansas Supreme Court has recognized that the Minimum Price Order was void *ab initio*. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 184 Kan. 540 (1959), *cert. denied*, 361 U.S. 836 (1959). In the many similar actions brought by pipeline companies to recover overpayments during the several years since this Court's invalidation of the Kansas Order (*Cities Service Gas Co.* v. *State Corporation Commission*, 355 U.S. 391 (1958)), the courts, both state and federal, have uniformly recognized that the filing of the Kansas Order with the Commission as part of a rate schedule did not have the effect of increasing the filed rate above the level provided in the sales contract between the parties. *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co., Inc.*, 297 F.2d 561 (8th Cir. 1962), *cert. denied*, 370 U.S. 937 (1962); *Natural Gas Pipeline Co. of America* v. *Federal Power Commission*, 253 F.2d 3, 7 (3d Cir. 1958), *cert. denied sub nom, Dorchester Corp.* v. *Natural Gas Pipeline Co. of America*, 357 U.S. 927 (1958); *Natural Gas Pipeline Co. of America* v. *Harrington*, 246 F.2d 915 (5th Cir. 1957),

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[12] (Continued)

Similarly, when it dismissed the investigation into Western's rates instituted under Section 5(a) of the Natural Gas Act (see Pet., pp. 6-7), the Commission stated:

> "We * * * do not reach the questions whether Western's individual rates are just and reasonable because we believe that decision on this question is not administratively justifiable or necessary under the particular circumstances of this case. Thus the dismissal is not a determination that * * * the present existing rates should be continued in effect * * *; * * *. [T]his order * * * *shall not be construed as a determination as to what the effective legal rates are or have been for jurisdictional sales by Western.*" (Emphasis supplied.) (*Western Natural Gas Co.*, 23 F.P.C. 235, 237 [1960]).

cert. denied, 356 U.S. 957 (1958); *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F.2d 860, 865 (10th Cir. 1958), *cert. denied sub nom, Magnolia Petroleum Co.* v. *Cities Service Gas Co.*, 358 U.S. 837 (1958); *Saturn Oil and Gas Co.* v. *Northern Natural Gas Co.*, 359 F.2d 297, 301 (8th Cir. 1966); *Cities Service Gas Co.* v. *United Producing Co.*, 212 F.Supp. 116 (N.D. Okla. 1960); *Northern Natural Gas Co.* v. *Landon*, 212 F.Supp. 856 (D. Kan. 1961), *aff'd* 338 F.2d 17 (10th Cir. 1964), *cert. denied*, 381 U.S. 914 (1965); *Helmerich & Payne* v. *Colorado Interstate Gas Co.*, 187 A.2d 67 (Del. 1962); *Columbian Fuel Corp.* v. *Superior Court*, 158 A.2d 478 (Del. 1960); *Cities Service Gas Co.* v. *Columbian Fuel Corp.*, 155 A.2d 879 (Del. Super. Ct. 1959).

The universally applied rule was summarized by the Court of Appeals for the Eighth Circuit in *Saturn, supra* (359 F.2d at 301):

> "As heretofore pointed out, courts have consistently held that rates imposed by an invalid order, such as the Kansas order, are void ab initio and a complete nullity. A void rate order cannot modify or alter a valid contract rate. Hence, as we stated in *Pan American* [*Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F.2d 561 (8th Cir. 1962)] the result of the determination of the invalidity of the Kansas order was to leave the parties where they were prior to the unlawful order. In other words, the Kansas order could have no bearing upon the effective rate and the effective rate was the rate the parties bargained for in their original contract * * *.
>
> * * * * * *
>
> "It is our view that our *Pan American* case and the authorities there cited and relied upon define the meaning of effective rate under the circumstances

here presented and make it clear that the Kansas rate order is part of the effective rate only upon the contingency that its validity is upheld. The final determination that the Kansas order is void ab initio deprives such order from having any bearing upon the effective gas rate. After such adjudication, the effective rate is the rate fixed by the original contract."

Since, under the cases listed above, the contract rate remained the effective filed rate, the filed rate doctrine does not bar the holding of the Delaware court that Cities was entitled to a refund of the excess over the contract rate paid pursuant to the void Kansas Order.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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